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Pleading-Appeal and Error Reversal Because of Erroneous Overruling of Demurrer

PLEADING—APPEAL AND ERROR—REVERSAL BECAUSE OF ERRONEOUS OVERRULING OF DEMURRER—Plaintiff sued for breach of a written contract. Plaintiff was appointed superintendent of city schools in Crawfordsville for a period of three years. He alleged that defendant discharged him "in violation of contract and without good cause." Defendant demurred to the complaint on the ground of insufficient facts because the complaint did not show that plaintiff was discharged by action of the board in which the board acted in bad faith, corruptly, fraudulently, or that the board had grossly abused its discretion. Demurrer was overruled and defendant filed a general denial. The case was tried and judgment was rendered for the plaintiff. Defendant appealed assigning as errors, first, that the trial court erred in overruling the demurrer to the complaint; and second, that the trial court erred in overruling defendant's motion for a new trial. Held, demurrer to the complaint should have been sustained and the judgment is therefore reversed.[1]

It is obvious that the court in the principal case reversed the decision of the trial court solely because of the erroneous overruling of the demurrer. The court said, "Our ruling as to the demurrer makes it unnecessary to consider the other questions presented by this appeal." The other important question presented by the appeal, as stated in the facts, was whether the lower court wrongfully overruled the defendant's motion for a new trial. The appellate court absolutely refused to consider the merits of the controversy when it refused to consider the ruling of the lower court on the defendant's motion for a new trial; and therefore the reversal was had merely because of an erroneous ruling on the demurrer. This action of the court is in violation of the statutes covering this situation. Section 725 Burns 1926 provides that "no judgment shall be stayed or reversed, in whole or in part, for any defect in form, variance, or imperfection contained in the record, pleadings, process, entry, returns, or other proceedings therein which by law might be amended by the court below, but such defects shall be deemed to be amended in the Supreme Court; nor shall any judgment be stayed, or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below." Section 426 Burns 1926 provides that "the court must in every stage of the action disregard any error or defect in the pleadings or proceedings which does not affect the substantial right of the

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Washburn Crosby Co. v. Cook (1918), 70 Ind. App. 463, 120 N. E. 434; Nissen Transfer Co. v. Miller (1920), 72 Ind. App. 261, 125 N. E. 652; Coppes Bros. & Zook v. Pontius (1917), 76 Ind. App. 298, 131 N. E. 845; McDowell v. Duer (1922), 78 Ind. App. 440, 133 N. E. 839; Hossier Veneer Co. v. Ingersol (1922), 78 Ind. App. 518, 134 N. E. 301; Latshaw v. McCarter (1922), 79 Ind. App. 623, 137 N. E. 565; Spichelmeier Fuel & Supply Co. v. Thomas (1924), 81 Ind. App. 604, 144 N. E. 566; Crockett v. Calvert (1826), 8 Ind. 127; Zeitlow v. Smock (1917), 65 Ind. App. 643, 117 N. E. 665; Braxton v. Mendelson (1922), 233 N. Y. 122, 135 N. E. 198; Louchrian v. Autophone Co. (1902), 78 N. Y. S. 919; Kavanaugh v. Belden (1931), 247 N. Y. S. 714; Constello's Case (1919), 232 Mass. 456, 122 N. E. 560.

[1] School City of Crawfordsville v. Montgomery, Supreme Court of Indiana, 1933, 187 N. E. 57.

adverse party; and no judgment can be reversed by reason of such error or defect." Section 368 Burns 1926 provides "the judgment upon overruling a demurrer shall be that the party plead over, and the answer or reply shall not be deemed to overrule the objection taken by demurrer. But no objection taken by demurrer and overruled shall be sufficient to reverse the judgment, if it appears from the whole record that the merits of the cause have been fairly determined." These three statutes thus provide, in effect, that if there has been a judgment on the merits, the judgment will not be reversed. In Chicago, Indiana, and Southern Railroad Co. v. Taylor,[2] the court applied the rule stated in Section 368 Burns 1926, and said, "For the purpose, therefore, of determining whether the case has been fairly tried and the right result reached, we pass to a consideration of the said exceptions to the conclusions of law, and to the appellant's motion for a new trial." In the principal case, as was shown, the court refused to consider the overruling of the motion for a new trial after it had determined that the demurrer was erroneously overruled. In Cleveland, C., C. and St. Louis Ry. Co. v. Gillespie,[3] the court applied the proper rule in holding that the overruling of a demurrer for insufficient facts is not reversible error where evidence is introduced covering the deficiency and the case was fairly tried and determined on the merits. State ex rel Davis v. Board of Commissioners of County of Newton,[4] applied the rule where there was an erroneous overruling of a demurrer to a paragraph of an answer. The court in Pittsburgh, C., C. and St. Louis Ry. Co. v. Rushton,[5] applied the correct rule as applied in the previously cited cases when it held that even a failure to adopt a theory of the case was not reversible error if the case was fairly tried and determined on its merits and if it appeared from the entire record that the erroneous ruling to the objection taken because the plaintiff adopted no theory, did not prejudice the adverse party.[6] It is thus seen that the court in the principal case was wrong in reversing the decision solely upon the grounds of an erroneous overruling of a demurrer to the complaint, the court saying nothing as to whether the case was decided on its merits in the lower court or not, and refusing to consider whether or not there was a decision on the merits.

The question may be asked, what is the effect of the above cited cases upon the cases which hold that if a demurrer to a paragraph of a complaint is wrongfully overruled, the judgment will be reversed if the record doesn't affirmatively show that the judgment was based on a good paragraph of the complaint.[7] The cases holding such apply the rule without

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[2] Chicago, Indiana, and Southern Railroad Co. v. Taylor (1914), 183 Ind. 240, 108 N. E. 1.

[3] Cleveland C. C. and St. Louis Ry. Co. v. Gillepsie (1930), 173 N. E. 708, 6 Ind. Law J. 402.

[4] State ex rel Davis v. Board of Commissioners of the County of Newton (1905), 165 Ind. 262, 74 N. E. 1091.

[5] Pittsburg C. C. and St. Louis Ry. Co. v. Rushton (1925), 90 Ind. App. 227, 148 N. E. 337.

[6] 6 Ind. Law J. 402, 575.

[7] Robinson v. Dickey (1893), 143 Ind. 205, 42 N. E. 697; Marvin v. Sager (1896), 145 Ind. 261, 44 N. E. 310; Ervin v. State (1897), 150 Ind. 332, 48 N. E. 249; Baltimore and Ohio Southwestern Railroad Co. v. Roberts (1903), 161 Ind. 1, 67 N. E. 530; Kelley v. Bell (1909), 172 Ind. 590, 88 N. E. 58; Knight v. Knight (1892), 6 Ind. App. 268, 33 N. E. 456; Baldwin v. Hutchison (1893), 8 Ind. App.

considering whether or not there was a decision on the merits. Where there is a reversal because of this rule, it is had solely upon the grounds that the record does not show that the judgment was rendered on a good paragraph of the complaint.[8] It is clear that when a court reverses the decision because of such a reason and doesn't consider whether or not there was a decision on the merits, the result is contra to the statutes. It is submitted that the cases cited to the proposition that a judgment will not be reversed if there is a decision on the merits, overrule the line of cases which hold that if a paragraph of the complaint is wrongfully overruled, it is reversible error if it doesn't appear from the record that the judgment is based on a good paragraph; and that the former cases properly give effect to the statutes. M. K.

PROCESS—JUDGMENT—CONCLUSIVENESS OF SHERIFF'S RETURN—In a suit to quiet title to certain real estate, appellee and her husband were defaulted and judgment was rendered quieting title to said real estate in appellant. Appellee filed suit to set aside this judgment, and the court ordered a summons be served on appellant. The sheriff's return on the summons stated that it was served on appellant by leaving a copy at his last and usual place of residence, 1595 Cleveland Street, Hammond, Indiana. Appellant did not live at 1595 Cleveland Street, but lived in Gary, Indiana. Appellant was defaulted, and the first judgment in favor of appellant was set aside. Appellee filed an answer in that suit, praying that title to said real estate be quieted in her. The case was tried in appellant's absence and without his knowledge. Judgment was rendered in favor of appellee, quieting title in her. Thereafter appellee conveyed the land to a third party. Appellant brought a second suit to quiet title against appellee and her remote grantee. From a judgment in favor of appellee, appellant appealed. Held, the trial court could not set aside the judgment which quieted title in appellant, he not having received notice of the pendency of said cause "as in an original action," as provided in Section 423, Burns, 1926.[1]

Appellant's second suit to quiet title constituted a collateral attack on the previous judgment against him, since it was an attempt to avoid or correct that judgment in a proceeding not provided by law for that purpose.[2] In the principal case, the Indiana Appellate Court nevertheless held that the sheriff's return was not conclusive as to matters which are not presumptively within his personal knowledge: e. g., the usual place of residence of the person served. The case therefore holds in effect that a sheriff's return is not conclusive against collateral attack as to matters not presumptively within his personal knowledge. The only authority cited for this holding is State of New Jersey v. Shirk.[3] In that case the judgment was attacked by a cross-action. The court first held that the cross-action constituted a direct attack on the judgment, and then decided that the sheriff's return was not conclusive as to matters not presumptively within his knowl-

454, 35 N. E. 711; Bedford Quarries Co. v. Turner (1906), 38 Ind. App. 552, 77 N. E. 58.

[8] Baltimore Ry. Co. v. Hunsacker (1903), 33 Ind. App. 27, 70 N. E. 556.

[1] Papuschak v. Burich, 185 N. E. 876 (Ind.).

[2] Spencer v. Spencer (1903), 31 Ind. App. 321, 67 N. E. 1018.

[3] 75 Ind. App. 275, 127 N. E. 861.